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In the Supreme Court of the United States

BLACKWATER SECURITY CONSULTING, LLC, *et al.*,
Petitioners,
v.

RICHARD P. NORDAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

MICHAEL P. SOCARRAS
M. MILLER BAKER
MICHAEL S. NADEL
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
(202) 756-8000

KENNETH W. STARR
Counsel of Record
RICK RICHMOND
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

JOSEPH E. SCHMITZ
THE PRINCE GROUP
1650 Tysons Boulevard, Suite 800
McLean, VA 22102
(703) 663-6997

Attorneys for Petitioners Blackwater Security Consulting LLC, and Blackwater Lodge and Training Center, Inc.

Additional Counsel Listed on Inside Front Cover

February 6, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

KIRK G. WARNER
SMITH, ANDERSON, BLOUNT,
DORSETT, MITCHELL & JERNIGAN
P.O. Box 2611
Raleigh, NC 27602
(919) 821-1220

SUSAN E. ENGEL
JENNIFER S. ATKINS
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Petitioners Blackwater Security Consulting LLC, and Blackwater Lodge and Training Center, Inc.

QUESTIONS PRESENTED

1. Whether a federal district court that lacks subject-matter jurisdiction over a removed action must dismiss rather than remand the action when the state court also lacks jurisdiction.

2. Whether a court of appeals has jurisdiction to review a district court's remand order notwithstanding 28 U.S.C. § 1447(d) when the remand order would circumvent federal statutory and federal constitutional designs to preclude state court jurisdiction.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS FOR GRANTING THE PETITION 1

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS OVER WHETHER A REMOVED ACTION SHOULD BE DISMISSED OR REMANDED WHEN BOTH THE FEDERAL AND STATE COURTS LACK JURISDICTION. 1

II. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S REMAND ORDER, NOTWITHSTANDING 28 U.S.C. § 1447(d) 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Aliota v. Graham,
984 F.2d 1350 (3rd Cir. 1993) 10

Barbara v. NYSE,
99 F.3d 49 (2d Cir. 1996) 3

Bell v. City of Kellogg,
922 F.2d 1418 (9th Cir. 1991) 3, 5

California v. NRG Energy Inc.,
391 F.3d 1011 (9th Cir. 2004) 9

General Elec. Co. v. E.P.A.,
360 F.3d 188 (D.C. Cir. 2004) 10

In re Elko County Grand Jury,
109 F.3d 554 (9th Cir. 1997) 3

Johnson v. Robison,
415 U.S. 361 (1974) 10

Minnesota v. United States,
305 U.S. 382 (1939) 2

Osborn v. Haley,
No. 05-593, 2007 WL 135830
(U.S. Jan. 22, 2007) 6, 7, 8, 10

Powerex Corp. v. Reliant Energy Services, Inc.,
No. 05-85, 2007 WL 124795
(U.S. Jan. 19, 2007) 6, 8, 9

Smith v. Cromer,
159 F.3d 875 (4th Cir. 1998) 3

Thermtron Products, Inc. v. Hermansdorfer,
423 U.S. 336 (1976) 6

Statutes

28 U.S.C. § 1441 5

28 U.S.C. § 1441(f) 2, 9

28 U.S.C. § 1442 ..... 3, 5, 9

28 U.S.C. § 1447(c) 2, 7

28 U.S.C. § 1447(d) ..... passim

28 U.S.C. § 2679(d)(2) 7

42 U.S.C. § 1651 ..... 1, 5, 7

42 U.S.C. § 1651(c) 7

42 U.S.C. § 1653(a) 7

42 U.S.C. § 1653(b) 7

INTRODUCTION

Respondent does not dispute that the Fourth Circuit's decision allows him to litigate in a state court claims that challenge whether military contract personnel serving the United States military were properly armed and commanded on the streets of Fallujah. This exposure to an unpredictable, and uninsurable, state tort liability is precisely what Congress intended to foreclose in the Defense Base Act, 42 U.S.C. § 1651 *et seq.* ("DBA"), by providing for an exclusive liability scheme to be administered by the U.S. Department of Labor subject only to federal court review. Allowing the district court's remand order to stand confers on state courts the very jurisdiction that Congress took away. Such a remand not only is "futile," as some courts of appeals have held in dismissing cases where the state court lacks jurisdiction, but it also contravenes Congressional intent to ensure that military contractors overseas have no liability except DBA liability determined exclusively in a federal forum. This case implicates a sensitive military policy authorized by Congress and implemented by the Executive Branch. It thus presents a compelling vehicle for resolving a recurrent question of federal practice under the removal statutes, a question which has divided the courts of appeals and over which there is no bar to appellate review.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS OVER WHETHER A REMOVED ACTION SHOULD BE DISMISSED OR REMANDED WHEN BOTH THE FEDERAL AND STATE COURTS LACK JURISDICTION.

There is no dispute that the courts of appeals are divided over whether dismissal or remand of a removed case is

proper when both the federal and state courts lack subject-matter jurisdiction. Respondent instead argues that Congress abolished the derivative-jurisdiction doctrine when it enacted 28 U.S.C. § 1441(f). Opp. 20-22. But Section 1441(f) does not sweep as broadly as respondent suggests, and thus, not surprisingly, respondent cannot explain away the split in the circuits over the continuing vitality of the derivative-jurisdiction doctrine. This court should grant certiorari to resolve that split and clarify that a federal court must dismiss rather than remand a case when *both* the federal and state courts lack jurisdiction over the removed case, regardless of the basis of removal to federal court.

Section 1441(f) provides only that a state court's lack of jurisdiction does not divest the federal court of jurisdiction to hear a removed case. *See* 28 U.S.C. § 1441(f) (a federal court is "not precluded from hearing and determining any claim [in a removed case] because the State court ... did not have jurisdiction over that claim"). The derivative-jurisdiction doctrine had provided the opposite, requiring federal courts to dismiss a removed case for lack of jurisdiction when the state court lacked jurisdiction, even though the federal court would have had original subject-matter jurisdiction. *See Minnesota v. United States*, 305 U.S. 382, 389 (1939) ("For jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction."). Section 1441(f) overturns this aspect of the derivative-jurisdiction doctrine, but it does not address a second aspect: whether a federal court must dismiss rather than remand a removed case when both the federal and state courts lack jurisdiction. That aspect of the derivative-jurisdiction doctrine is alive and well today, as illustrated by both the "futility" exception to 28 U.S.C. § 1447(c), *see, e.g.*,

Bell v. City of Kellogg, 922 F.2d 1418, 1425 (9th Cir. 1991); *Barbara v. NYSE*, 99 F.3d 49, 56 n.4 (2d Cir. 1996), and federal courts' dismissal of cases removed under the federal officer removal statute, 28 U.S.C. § 1442, when the state court also lacks jurisdiction. *See Smith v. Cromer*, 159 F.3d 875, 879, 883 (4th Cir. 1998) (dismissing and citing the derivative jurisdiction doctrine); *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997) (same).

Respondent offers no reason why this Court should leave lingering the disarray in the courts of appeals over whether dismissal is appropriate under the derivative-jurisdiction doctrine when remand would be "futile" because the state court also lacks jurisdiction. Instead, respondent argues the merits of whether the state court lacks jurisdiction over his claims, asserting repeatedly that there has been "no determination of DBA coverage." Opp. 22-27. This is irrelevant, however, to the propriety of certiorari in this case. In the first instance, there has been at least one final DBA coverage determination by the U.S. Department of Labor involving one of the four decedents in this matter; moreover, there are ongoing DBA proceedings involving two of the other three decedents, as well as a *de facto* final order in the form of a "Memorandum of Informal Conference" for the fourth decedent, each of whom is represented by respondent's counsel. It is indisputable that through these administrative proceedings full DBA benefits have been paid in all four cases, as explained more fully by Amicus American International Group, Inc. *See* Amicus Br. 9-12. This demonstrates that the Department of Labor has already determined the DBA coverage issues that respondent repeatedly suggests have yet to be made.[1] And the

[1] On behalf of decedent Zovko, who had no known DBA beneficiaries, the Department of Labor entered a final DBA compensation order for benefits paid by Blackwater's DBA insurer into a special DBA fund. Beneficiaries of the three other decedents applied for and have

correspondence attached to respondent's opposition brief does not speak to the scope of DBA coverage in this case.[2]

More importantly, the merits of the DBA coverage question have no impact on this Court's ability to consider whether the derivative-jurisdiction doctrine continues to require dismissal rather than remand when both federal and state courts lack subject-matter jurisdiction, as here where Congress has provided an exclusive administrative liability scheme. This Court is not being asked to determine whether the claims are covered by the DBA; rather, the question is whether, under the derivative-jurisdiction doctrine, the district court should have determined whether the DBA's exclusive liability provision strips state courts of jurisdiction over respondent's claims in the first place, thus precluding remand — a question the district court erroneously concluded it lacked jurisdiction to resolve, App. 56a. The Fourth Circuit in turn erroneously concluded that under Section 1447(d), it lacked appellate jurisdiction to review the district court's failure to make that determination. App. 25a.

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continuously received DBA benefits at maximum rates since the enemy attack of March 31, 2004. Despite representations to the courts by counsel (who represents both the respondent here and the beneficiaries) that the DBA does not apply, counsel has said nothing in agency proceedings to prejudice the beneficiaries' continued receipt of DBA benefits. Agency proceedings as to decedents Batalona, Helvenston and Teague remain formally open only because respondent's counsel asserts the right to withhold consent to the entry of final compensation orders confirming the insurer's obligation to pay benefits.

[2] Respondent suggests that correspondence between the United States Army and the Chairman of a Congressional Subcommittee demonstrates that "coverage under the DBA is doubtful." Opp. 23. But that correspondence merely states that Blackwater did not perform particular government contract services directly for Kellogg Brown and Root ("KBR"). It says nothing about the DBA claims at issue in this case.

Respondent also attempts to dismiss as irrelevant the differential treatment of cases removed under Sections 1441 and 1442, arguing instead that petitioners did not remove this case under Section 1442. Opp. 27-28. But petitioners are not asking this Court to review whether removal was appropriate under Section 1442. Rather, the differential treatment of cases removed under these two provisions is a direct result of, and illustrates, the confusion in the lower courts concerning removal practice in cases in which both the state and federal courts lack jurisdiction. There is no principled basis for courts to dismiss cases removed under Section 1442 but remand those removed under Section 1441 where both the federal and state courts lack jurisdiction over the removed case. And this case exemplifies why it makes no sense to apply the derivative-jurisdiction doctrine under the one provision but not the other: had Blackwater cited both removal provisions, the Fourth Circuit's jurisprudence would have commanded the district court both to remand under Section 1441 (without considering state-court jurisdiction) and to dismiss under Section 1442 (because the state court lacked jurisdiction).

It is undisputed that the DBA strips both state courts and federal courts of jurisdiction to hear DBA claims in the first instance, regardless of under what federal statute a lawsuit implicating DBA claims is removed, because the DBA's "liability as exclusive" provision, 42 U.S.C. § 1651(c), is inextricably related to DBA claims processed by the Department of Labor in the first instance. This Court should clarify that the derivative-jurisdiction doctrine continues to require that federal district courts lacking jurisdiction over removed actions must dismiss rather than remand actions where, as in the DBA, Congress intended to divest the state courts of jurisdiction. A remand in such circumstances is "futile," *Bell*, 922 F.2d at 1425, and is contrary to Congressional intent that at least the "liability as exclusive"

aspect of such cases be resolved by a federal administrative agency in the first instance (followed by federal court review). Given the national significance of this case, the petition for certiorari presents a compelling opportunity to resolve this important and recurring question of federal practice under the removal statutes.

II. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S REMAND ORDER, NOTWITHSTANDING 28 U.S.C. § 1447(d).

Rather than defend the district court's decision to remand rather than dismiss this case, respondent contends that the Court cannot decide the first question presented because 28 U.S.C. § 1447(d) precludes appellate review of the district court's remand order. Respondent's argument flies in the face of this Court's recent decision in *Osborn v. Haley*, No. 05-593, 2007 WL 135830 (U.S. Jan. 22, 2007), which makes clear that Section 1447(d) poses no bar to appellate review where, as here, Congress has divested the state court of jurisdiction over the case. Likewise, this Court's recent grant of certiorari in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85, 2007 WL 124795, at *1 (U.S. Jan. 19, 2007), is further evidence that respondent's dispute over appellate jurisdiction under Section 1447(d) should not preclude this Court from granting certiorari.

This Court's recent *Osborn* decision rejects respondent's claim that Section 1447(d) constitutes "a blanket prohibition against appellate review in *every* case that is remanded for want of subject matter jurisdiction." Opp. 14. In *Osborn*, the Court held that Section 1447(d) does *not* preclude appellate review of every district court order remanding a case for lack of subject-matter jurisdiction. While *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), "held that § 1447(d) must be read together with

§ 1447(c)," *Osborn*, 2007 WL 135830, at *11, the Court rejected the contention that all remand orders issued under Section 1447(c) are immune from appellate review. Rather, Sections 1447(c) and (d) also "must be read together with the later enacted § 2679(d)(2)," which bars a district court from remanding a certified Westfall Act case back to state court. *Osborn*, 2007 WL 135830, at *11-12. This "forum-select[ion]" provision of the Westfall Act "renders the federal court exclusively competent and categorically precludes a remand to the state court." *Id.* at *11. Even though the district court had remanded for lack of subject-matter jurisdiction under Section 1447(c), *see id.* at *6-7, the Court held that the later-enacted Westfall Act prevailed over Section 1447(d), permitting appellate review of the district court's remand order.

Osborn resolves any question of appellate jurisdiction in this case. Section 1447(d) does not preclude appellate review of the district court's remand order because the later-enacted DBA displaces state-court jurisdiction over respondent's claims and thus precludes the district court from remanding the case. Congress has determined that military contractors overseas are to be liable only under the DBA — "exclusive[ly] and in place of all other liability," 42 U.S.C. § 1651(c) — not under a competing patchwork of state tort laws. And Congress has determined that questions of DBA coverage are to be decided exclusively by the Department of Labor in the first instance, followed by federal court review. *See id.* §§ 1651(c), 1653(a)-(b). The DBA selects a forum for resolution of DBA cases — the Department of Labor — that, under *Osborn*, "renders the federal [agency] exclusively competent and categorically precludes a remand to the state court." 2007 WL 135830, at *11. The Fourth Circuit's decision allowing the district court to remand this case and construing Section 1447(d) to preclude appellate review of the remand order erroneously

commits the federal question of DBA coverage to the state court when Congress intended that it be determined exclusively in a federal forum. Like the Westfall Act's "forum selection" clause, the DBA's forum selection clause controls over Section 1447(d).

Osborn cannot be distinguished on the ground that Congress expressly addressed the question of removal in the Westfall Act but did not in the DBA. There was no reason for Congress to address removal in the DBA *because Congress also divested the federal courts of original jurisdiction when it selected the Department of Labor as the initial forum for DBA claims*. While *Osborn* holds that appellate review of remand orders is proper where "Congress has ordered the intercourt shuttle to travel just one way," 2007 WL 135830, at *12, its reasoning applies with even greater force where Congress has ordered the shuttle to travel out of the courts and to an administrative agency.

There is thus no procedural hurdle to granting the petition for certiorari to review the Fourth Circuit's decision below. This Court recently granted certiorari in a case presenting an important question regarding a provision of the Foreign Sovereign Immunities Act of 1976. *See Powerex*, 2007 WL 124795, at *1. There, as here, the district court remanded the case to state court, and in opposing certiorari, the respondent argued that Section 1447(d) precludes appellate review of the district court's remand order. Even before this Court handed down its decision in *Osborn*, the Solicitor General argued that respondent's narrow construction of Section 1447(d) was incorrect and should not preclude this Court's review. The Court agreed, granting certiorari to review the question presented with respect to the Foreign Sovereign Immunities Act, as well as the question whether the court of appeals had jurisdiction notwithstanding Section 1447(d). *See Powerex*, 2007 WL 124795, at *1.

So too here. Section 1447(d) imposes no bar to this Court's review, and this case presents a compelling opportunity for this Court to clarify an important question of federal practice.

Indeed, the Ninth Circuit's decision in *Powerex*, *see California v. NRG Energy Inc.*, 391 F.3d 1011, 1023 (9th Cir. 2004), is in conflict with the Fourth Circuit's decision below. In *Powerex*, two federal agencies removed the case under Section 1442. *See NRG Energy*, 391 F.3d at 1021. The district court held that neither the state court nor the federal court had jurisdiction, and after noting the disarray in the circuits over the continued vitality of the derivative-jurisdiction doctrine in the aftermath of Section 1441(f)'s enactment, *see* App. to Pet. for Cert., *Powerex*, No. 05-85, at 43a (U.S. July 15, 2005), it remanded the claims against the federal agencies. The Ninth Circuit reversed, holding that it had appellate jurisdiction to review the remand order notwithstanding Section 1447(d), *see NRG Energy*, 391 F.3d at 1023, and that because both the district court and state court lacked jurisdiction over the claims against the agencies, the district court should have dismissed the case rather than remand it. *See id.* at 1027.

Although the Ninth Circuit's decision with respect to the federal agencies is not directly implicated in this Court's grant of certiorari in *Powerex*, the conflict between the Fourth Circuit's decision below and the Ninth Circuit's decision further underscores the recurring nature of the questions presented in this case.

Finally, Blackwater notes that respondent misleadingly contends that Blackwater did not raise the political question doctrine in the courts below. Opp. 19. *But see* Pet. App. 26a-27a (addressing Blackwater's argument "that § 1447(d) does not prohibit appellate review in this case because the district court's decision to remand undermines the

constitutional sequestration of foreign affairs and war powers within the political branches of the federal government, out of reach of both the federal and the state judiciaries"). In this regard, respondent does not even address this Court's precedent in *Johnson v. Robison*, 415 U.S. 361 (1974), cited by both Blackwater, Pet. 22, and by Amicus American International Group, Inc., Amicus Br. 8, in which this Court held that "a provision barring review of individual veterans benefit determinations did not bar a constitutional challenge to the statute itself. The Court distinguished 'those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing benefits for veterans' from constitutional challenges to 'a decision of Congress.' This circuit, like others, has followed *Robison* and its progeny." *General Elec. Co. v. E.P.A.*, 360 F.3d 188, 192 (D.C. Cir. 2004) (citing *Johnson*, 415 U.S. at 367).[3]

This second of two circuit splits addressed in Blackwater's petition, Pet. 23-24, between the *Johnson v. Robison* line of cases on the one hand, and the Fourth Circuit below joined only by the Ninth Circuit, highlights the need for this Court both to invite the views of the Solicitor General and to grant certiorari.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted. In the alternative, this Court should invite the views of the Solicitor General.

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[3] Respondent notes in a footnote that *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993), is the only one of the "eight Circuit cases cited by Blackwater [as the progeny of *Robison* that] analyze[s] or even mention[s] Section 1447(d)." Opp. 16 & n. 3. In this regard, Blackwater cited *Aliota*, 984 F.2d at 1357, for its recognition of "jurisdictional concerns associated with the inability to review a constitutional decision." Pet. at 24. In *Osborn*, the Court also cited *Aliota* as "inform[ing]" its disposition of the case. 2007 WL 135830, at *9.

Respectfully submitted,

MICHAEL P. SOCARRAS
M. MILLER BAKER
MICHAEL S. NADEL
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
(202) 756-8000

KENNETH W. STARR
Counsel of Record
RICK RICHMOND
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

JOSEPH E. SCHMITZ
THE PRINCE GROUP
1650 Tysons Boulevard, Suite 800
McLean, VA 22102
(703) 663-6997

SUSAN E. ENGEL
JENNIFER S. ATKINS
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

KIRK G. WARNER
SMITH, ANDERSON, BLOUNT,
DORSETT, MITCHELL & JERNIGAN
P.O. Box 2611
Raleigh, NC 27602
(919) 821-1220

Attorneys for Petitioners Blackwater Security Consulting LLC, and Blackwater Lodge and Training Center, Inc.